

MICHAEL D. SCHRUNK, District Attorney for Multnomah County

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February 14, 2002

Brent Hunsberger Business News Reporter The Oregonian 1320 SW Broadway Portland, OR 97201-3499

James J. Kirk Assistant General Counsel Port of Portland 121 NW Everett Portland, OR 97209

Re: Petition of Brent Hunsberger on behalf of The Oregonian received January 14, 2002 to disclose certain records of the Port of Portland

Dear Mr. Hunsberger and Mr. Kirk:

On this public records petition, ORS 192.410 et. seq., petitioner Brent Hunsberger requests the District Attorney to order the Port of Portland (POP) and its employees to make available for inspection or copying the following records:

Correspondence and communications related to deepening the Columbia River navigation channel that were withheld from The Oregonian's inspection under ORS 192.501(1), which exempts records pertaining to litigation.

On September 15, 2001, petitioner submitted his extensive request to Ms. Eliza Dozono, Corporate Media Manager for the POP. In response, the Port provided approximately 216 documents under the heading "e-mails," 395 documents titled "Executive Department," 98 documents titled "Bob Hrdlicka's Documents," and 73 documents titled "Planning & Policy Development." All or parts of 51 documents were not disclosed as privileged attorney-client communications.

In the petition, Mr. Hunsberger highlighted thirteen of the withheld documents that "did not appear to authored by or directed to the Port's Attorney." Petitioner argued that the POP is not a party to a lawsuit dealing with the deepening project and that the POP has not shown that it expects to be a party of future litigation involving the largely federal project.

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On January 18, 2002, POP Assistant General Counsel James Kirk responded to the petition. We received a follow-up letter dated January 30, 2002. Counsel Kirk claimed all (or parts of all) documents were unconditionally privileged under ORS 40.225, attorney-client, and conditionally privileged under ORS 192.501(1), records pertaining to litigation. Two documents were asserted to be conditionally exempt under ORS 192.502 (4) as confidential submissions. This office was also provided with two affidavits of Ms. Dianne Perry, the Columbia River Channel Deepening Project Manager, together with a copy of the intergovernmental agreement between the POP and the Port of Vancouver, and an extensive chart listing most (if not all) of the attorneys for the six ports and all the representatives of the various ports.

Mr. Kirk subsequently submitted an e-mail and a February 4 letter to this office further explaining the relationship of the six Columbia River ports under the Channel Deepening Project, the role of the numerous attorneys involved in the litigation, and the public interest concerns of the Port of Portland. Petitioner provided a detailed letter on January 31 discussing certain documents and amplifying arguments that the public interest required disclosure of the documents sought in his petition. Mr. Kirk submitted a final six-page letter on February 8.

DISCUSSION

I. ATTORNEY-CLIENT PRIVILEGE.

The lawyer-client privilege of ORS 40.225 is incorporated by ORS 192.502(9) into an unconditional exemption under the Public Records Law. In its July 6, 1982 Public Records Order (Zaitz), the Attorney General determined that a review of such a claimed exemption is very limited:

If the purpose is not waived [by the client], the exemption is absolute; neither the preliminary language of ORS 192.500(2) nor paragraph (h) itself contains any language providing for a balancing test. If the lawyer-client privilege is applicable, the Attorney General cannot consider whether or not the information should be disclosed in the public interest, but must deny your petition. Attorney General's Public Records Manual, 2001, page F-5.

The centuries old common law doctrine has maintained the rule that "communications between an attorney and his client during and by reason of their relations as such...are deemed privileged." Sitton v. Peyree, 117 Or 107, 114 (1925). This doctrine has been codified in Oregon Evidence Code OEC 503 (ORS 40.225). The Oregon Supreme Court has made the availability of the privilege dependent on two conditions:

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- (1) the communications must be confidential within the meaning of OEC $503(1)(b)^{1}$, and
- (2) the communication must be made for the purpose of facilitating the rendition of professional legal services to the client. <u>State v. Jancsek</u>, 302 Or 270, 275 (1986).

The attorney-client privilege extends not only to the client but also to those individuals who constitute representatives of the client. ORS 40.225(1)(d) provides: "'Representative of the client' means a principal, an employee, an officer or a director of the client." The central issue explored in <u>State ex rel OHSU v. Haas</u> was the <u>extent</u> of protected communication between a lawyer and his client. "[T]he legal advice must originate with the lawyer but may be communicated by other individuals who are themselves covered by the privilege." 325 Or at 505. The Supreme Court noted that the attorney-client privilege is not limited to a "control group" but includes other individuals that "need to communicate on behalf of the client with the attorney for the purpose of receiving legal advice." <u>State ex rel OHSU v. Haas</u>, 325 Or at 508.

The scope of the privilege is set out with specificity in ORS 40.225(2):

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (a) Between the client or the client's representative and the client's lawyer or a representative of the lawyer;
- (b) Between the client's lawyer and the lawyer's representative;
- (c) By the client or the client's lawyer to a lawyer representing another in a matter of common interest;
- (d) Between representatives of the client or between the client and a representative of the client; or
- (e) Between lawyers representing the client.

After extended conversations with POP Assistant General Counsel Kirk, we feel much more knowledgeable about the roles of various attorneys (both POP counsel and outside counsel) and the numerous representatives of the six Columbia River ports. Of primary importance to the POP is the concept of "common interest" which would arguably protect communications between

OEC 503(1)(b) provides:

[&]quot;Confidential communication" means a communication not intended to be disclosed to third persons other than to those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

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the six port representatives. We are unable to agree with the Port's position. The privilege, in unambiguous language, only applies to communications "[b]y the client or the client's lawyer to a lawyer representing another in a matter of common interest." ORS 40.225(2)(c). The only exception to that bright line would be the few instances where a port representative, such as Dianne Perry, served as the conduit for a privileged communication between an attorney and another port representative.

The process of evaluating each document in this petition requires consideration of three basic questions: 1) was the communication of a confidential <u>legal</u> nature or more correctly commentary of a <u>policy</u> nature², 2) was the communication either directly or indirectly <u>to or from</u> a representative of a client and an attorney, and 3) was the communication <u>confidential</u> in nature? In the interest of time and space, this order does not provide an explanation of the rationale for our decision on each document.

A. E-MAILS

No. 125 – One-page e-mail from POP Assistant General Counsel Jeffery Ring to other counsel and representatives of the Ports - privileged. (POP has disclosed the 17-page draft Cooperation Agreement).

No. 126 - One-page memorandum from POP General Counsel Streisinger to representatives of the POP - privileged.

No. 127 - One-page e-mail from POP Assistant General Counsel Ring to POP representative David Lohman - privileged.

No. 146 - Two-page memorandum and comments contained in the 32-page Toxic Contaminants Impact report prepared by consultant Rick Cardwell at the direction of POP Assistant General Counsel Ring – privileged. (POP has disclosed the cover e-mail from Columbia River Channel Coalition Executive Director Dianne Perry and a redacted version of the other documents).

No. 155 – Three-page memorandum from POP General Counsel Ring to POP representatives – privileged.

No. 156 – One-page e-mail and 13-page memorandum from POP Assistant General Counsel Ring to Diane Perry and Alan Willis – privileged.

[&]quot;All these communications [of ORS 40.225(2)] must be specifically for the purpose of obtaining legal services for the client; otherwise the privilege does not attach." Kirkpatrick, <u>Oregon Evidence</u>, 3rd. ed. p. 210. "If the client consults with the lawyer as a friend, counselor, business advisor, executor, investigator, tax preparer, attesting witness, or scrivener, the privilege will not arise." *Ibid.*, p. 213.

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No. 222 – One-page of four e-mails and a one page memorandum attachment to the original e-mail. The first three e-mails to or from POP Assistant General Counsel Ring – privileged. The e-mail from POP representative Richard Finn to Dianne Perry and POP representatives David Lohman, Keith Leavitt and Bernie Bills and the attached memorandum – not privileged.

No. 224 - Three-page memorandum from POP Assistant General Counsel Ring to POP representatives - privileged.

B. EXECUTIVE DEPARTMENT

No. 137 - Three-page memorandum from outside counsel Peter Friedman to Dave Lohman - privileged.

No. 142 - Two-page memorandum from POP General Counsel Cory Streisinger to POP Executive Director Mike Thorne - privileged.

No. 145 – One-page memorandum from POP General Counsel Streisinger to POP Executive Director Thorne – privileged. (POP has disclosed the attached minutes and partial transcript).

No. 188 - One-page memorandum from Assistant General Counsel Brian Playfair to POP representatives - privileged.

C. BOB HRDLICKA' S DOCUMENTS

No. 8 – One-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors – <u>not</u> privileged. One-page briefing paper will be discussed (Section III below) under the claimed exemption as a confidential communication.

No. 9 – Two-pages of slides, one-page document entitled "Reconsultation Goals," and three-pages of charts. The information on the two slides and charts below the words "Ports Legal Team" in the Reconsultation Approaches Option 1 box and the information below the words "Legal Counsel" in the Reconsultation Approaches Option 2 box are privileged. The rest of the documents are <u>not</u> privileged. (POP has already disclosed one page of the slides and one page of the charts).

No. 10 and 11 - One-page document titled Channel Deepening Project. The line starting "Outside Counsel" and the two lines titled "Future Litigation Costs" are privileged. The rest of the document is not privileged.

No. 13 - Two-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors - <u>not</u> privileged except the fifth paragraph beginning "Our respective legal counsel" is privileged.

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No. 17 – Four-page Confidential Draft from POP representative Dave Lohman to POP Executive Director Thorne (edited from an initial draft by counselor Ring) – <u>not</u> privileged except for the first full paragraph of page three.

No. 23 – Three-page e-mail from POP Assistant General Counsel Ring to Dianne Perry and POP Counsel and representatives – privileged.

No. 26 – Two-page memo from Dianne Perry to the Washington and Oregon port directors and representatives, POP counsel, and outside counsel – privileged.

No. 29 – Two-page pre-meeting notes for March 6, 2000 channel brainstorming meeting and one-page list of attendees – <u>not</u> privileged.

No. 35 – One-page of slides relating to September 10, 1999 Project Engineering & Design Agreement – <u>not</u> privileged (POP has already disclosed the attached one-page document and one-page of slides).

No. 37 - One-Page of e-Mails to and from POP representative Alan Willis, POP Assistant General Counsel Ring, and POP outside attorneys Gail Achterman and Michael O' Connell - privileged.

No. 107 – Three-page document outline of major issues on channel deepening – <u>not</u> privileged.

D. PLANNING & POLICY DEVELOPMENT

No. 26 – Three pages of e-mails to and from POP outside attorney Achterman to POP Assistant General Counsel Ring and POP representatives Willis and Hrdlicka, forwarded to POP representatives Sebastian Degens and David Lohman – privileged.

No. 39 – One-page of e-mails to and from POP outside counsel Michael Campbell, POP Assistant General Counsel Ring, POP General Counsel Streisinger, POP outside counsel Achterman, and POP representatives Willis and Lohman – privileged.

No. 54 – One-page e-mail and four pages of slides from Amber Quinn, POP Legal Department Administrative Coordinator, to POP representatives Richard Finn, Keith Leavitt, David Lohman, and General Counsel Streisinger – not privileged.

No. 55 – Seven-page Litigation Summary sent as an e-mail attachment by POP Assistant General Counsel Ring to POP representatives Lohman, Finn, and Leavitt – privileged.

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- No. 56 Three-pages of e-mails to and from outside counsel O' Connell and Bartz, from Mr. Bartz to POP Assistant General Counsel Ring and outside counsel Achterman and then forwarded to POP General Counsel Streisinger and POP representatives Lohman, Willis, Finn, and Leavitt privileged.
- No. 57 Four-pages of e-mails to and from outside counsel O' Connell and Bartz, from Mr. Bartz to POP Assistant General Counsel Ring and outside counsel Achterman and then forwarded to POP General Counsel Streisinger and POP representatives Lohman, Willis, Finn, and Leavitt privileged.
- No. 58 One-page e-mail from outside counsel Beth Ginsberg to POP Assistant General counsel Ring and outside counsel Achterman privileged.
- No. 59 One-page of e-mails from POP representative Willis to numerous attorneys and POP representatives and response from POP representative Finn <u>not</u> privileged.
- No. 60 E-mail from POP Assistant General Counsel Ring to POP representatives Lohman and Willis and attached two-page Proposed Washington law firm budget privileged.
- No. 61 [same as Hrdlicka No. 8].
- No. 63 Two-pages of e-mails to and from POP Assistant General Counsel Ring and outside counsel Ginsberg, and then forwarded by counsel Ring to POP representatives Willis and Lohman, and POP General Counsel Streisinger privileged.
- No. 65 One-page of e-mails to and from POP Assistant General Counsel Ring and POP representative Lohman and attached three-page memorandum from Counsel Ring to Executive Director Thorne privileged.
- No. 66 One-page e-mail from POP Assistant General Counsel Ring to POP representatives Lohman, Hrdlicka, and POP General Counsel Streisinger with attached one-page exhibit privileged.
- No.68 One-page e-mail from POP Assistant General Counsel Ring to POP Assistant General Counsel Kirk, outside counsel Lynch, Achterman, Bartz, Stephenson, Ginsberg, and POP representatives Willis, Perry, Lohman, and Leavitt with attached three-page memorandum from counsel Ring to POP representatives Perry, Willis, and Bills and outside counsel Bartz privileged.

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No. 69 – One-page of e-mails from outside counsel Ginsberg to POP Assistant General Counsel Ring and outside counsel Stephenson, Bartz, and Achterman, forwarded from counsel Ring to POP representatives Willis and Perry, e-mail replies to and from Alan Willis and Jeff Ring, and forwarded from Dianne Perry to POP representatives Lohman, Leavitt, and Hrdlicka – privileged.

No. 72 – Two-pages of e-mails from Diane Perry to outside counsel Bartz, POP representatives Bills and Willis, and counsel Ring, response from David Bartz with copy to outside counsel Stephenson (and others), and response from counsel Stephenson – privileged.

No. 73 – One-e-mail from POP Assistant General Counsel Ring to POP representatives Lohman, Hrdlicka, Perry, Willis, Bills, outside counsel Bartz, Stephenson, and Ginsberg, and POP General Counsel Streisinger with attached three-page memorandum from counsel Ring to POP representatives Lohman, Hrdlicka, Perry, and Willis – privileged.

No. 75 - One-page response to e-mail from outside counsel Achterman to David Lohman – <u>not</u> privileged except the sentence following "(2) West Hayden Island" and the three sentences following "(3) Terminal 1/Urban Redevelopment." (POP has already disclosed the one-page e-mail from Darla Swensen, Executive Director Thorne's Administrative Coordinator to David Lohman, forwarded by Lohman to Dianne Perry, Gail Achterman, Keith Leavitt, Cheryl Koshuta, Trey Harbert, and Richard Finn).

No. 77 – Two-page e-mail from outside counsel James Lynch to POP Assistant General Counsel Ring forwarded to POP representatives Dianne Perry, David Lohman, Keith Leavitt, Richard Finn, and Alan Willis, and response from Alan Willis – privileged.

No. 79 - One-page e-mail from POP Assistant General Counsel Ring to David Lohman and Dianne Perry with attached twenty four-page edited document titled "Attorney Client Privilege DO NOT RELEASE" - privileged.

No. 80 – One-page e-mail from Dianne Perry to POP Assistant General Counsel Ring and outside counsel David Bartz, Walt Evans, Beth Ginsberg, and Guy Stephenson, and POP representative Bernie Bills (copy to various POP representatives) – privileged.

No. 83 – Three pages of e-mails from outside counsel Jim Lynch to POP Assistant General Counsel Ring and forwarded to outside counsel David Bartz and POP representatives Bernie Bills, Alan Willis, and Dianne Perry, with a response from Alan Willis, a reply to Alan Willis from David Bartz and a response to David Bartz from counsel Ring – privileged.

³ Counsel Kirk has advised this office that the edited document was a privileged Corps document provided in confidence to the Port's lawyers for comments. The Port is attempting to find the "fin al version" of the document for possible disclosure to The Oregonian.

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No. 86 - One page of e-mails from outside counsel Beth Ginsberg to Dianne Perry, Assistant General Counsel Ring, and outside counsel Bartz and Stephenson, forwarded with a two-paragraph comment from Dianne Perry to numerous POP representatives and Director and General Counsel Streisinger - all privileged except the second paragraph of Dianne Perry's comment.

No. 93 – One-page e-mail from Cathy Tortorici, NMSF, to Dianne Perry with attached two-page agenda for Columbia River Channel Improvement Project meeting, forwarded to outside counsel David Bartz, POP Assistant General Counsel Ring, and POP representative David Lohman, with response from counsel Ring – <u>not</u> privileged except the e-mail from counsel Ring.

No. 95 - E-mail from Dianne Perry to numerous POP representatives, outside counsel Bartz, and POP counsel Streisinger and Ring with attached two-page document (identical to No. 13), and response from counsel Ring - not privileged except the response from counsel Ring and the fifth paragraph of the two-page document beginning "Our respective legal counsel."

No. 98 - E-mail from Dianne Perry to numerous POP representatives and outside counsel Bartz with attached one-page draft document, one-page e-mail from POP Assistant General Counsel James Kirk to POP representative David Lohman, and one-page memorandum from counsel Kirk to counsel Ring – <u>not</u> privileged except the first sentence in the fourth paragraph of Dianne Perry's e-mail and the e-mail and memorandum from counsel Kirk.

II. LITIGATION EXEMPTION.

ORS 192.501(1) conditionally exempts:

Records of a public body pertaining to litigation to which the public body is a party if the complaint has been filed, or if the complaint has not been filed, if the public body shows that such litigation is reasonably likely to occur. This exemption does not apply to litigation that has been concluded...

The Court of Appeals has construed this exemption very narrowly and it is subject to a public interest analysis. "The purpose of this exemption is to place governmental bodies on an even footing with private parties before and during *court* litigation." Attorney General's Public Records Manual, 2001, p. 27. The exemption does not extend to records collected in the ordinary course of business but is limited to ".. information compiled or acquired by the public body for use in ongoing litigation..." Lane County School District v. Parks, 55 Or App 416, 420 (1981).

The Port of Portland has claimed the litigation exemption for all withheld records. The litigation in which the Port of Portland intervened was apparently filed on February 14, 2000

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against the National Marine Fisheries Service. POP Assistant General Counsel Kirk stated in his January 30 letter to this office that POP Assistant General Counsel Jeff Ring "concluded that litigation was reasonably likely when he first saw a draft of the Corps' eight-page biological assessment in January or February of 1999." We will accept that date for purposes of our evaluation of the withheld documents. The analysis is necessarily limited to those documents not determined to be exempt under the attorney-client privilege.

With respect to the documents below found to be exempt, it was also determined that the public interest did not require disclosure. With respect to the documents below found <u>not</u> to be exempt, it was determined that the litigation exemption simply did not apply.

A. E-MAILS

No. 222 – July 2000 e-mail (except noted privileged material) from POP representative Richard Finn to Dianne Perry and POP representatives David Lohman, Keith Leavitt and Bernie Bills and the attached memorandum – <u>not</u> exempt.

B. BOB HRDLICKA' S DOCUMENTS

- No. 8 October 2000 one-page memorandum from Senior Project Manager Dianne Perry to the six port managers or executive directors <u>not</u> exempt.
- No. 9 October 2000 six-pages of materials (except noted privileged material) concerning the Channel Deepening Project <u>not</u> exempt.
- No. 10 and 11 October 2000 one-page document (except noted privileged material) titled Channel Deepening Project <u>not</u> exempt.
- No. 13 October 2000 two-page memorandum (except noted privileged material) from Senior Project Manager Dianne Perry to the six port managers or executive directors <u>not</u> exempt.
- No. 17 October 2000 four-page Confidential Draft (except noted privileged material) from POP representative Dave Lohman to POP Executive Director Thorne <u>not</u> exempt.
- No. 29 March 2000 two-page pre-meeting notes for March 6, 2000 channel brainstorming meeting and one-page list of attendees exempt.
- No. 35 One-page of slides relating to September 10, 1999 Project Engineering & Design Agreement exempt.
- No. 107 Undated three-page document outline of major issues on channel deepening exempt.

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C. PLANNING & POLICY DEVELOPMENT

No. 54 – February 2000 one-page e-mail and four pages of slides from Amber Quinn, POP Legal Department Administrative Coordinator, to POP representatives Richard Finn, Keith Leavitt, David Lohman, and General Counsel Streisinger – exempt.

No. 59 – February 2000 one-page of e-mails from POP representative Willis to numerous attorneys and POP representatives and response from POP representative Finn – <u>not</u> exempt.

No. 75 One-page response to e-mail (except noted privileged material) from outside counsel Achterman to David Lohman – <u>not</u> exempt.

No. 86 - September 2000 e-mail comment (except noted privileged material) from Dianne Perry to numerous POP representatives and Director and General Counsel Streisinger- exempt.

No. 93 - October 2000 one-page e-mail from Cathy Tortorici, NMSF, to Dianne Perry with attached two-page agenda for Columbia River Channel Improvement Project meeting, forwarded to outside counsel David Bartz, POP Assistant General Counsel Ring, and POP representative David Lohman (Counsel Ring's r esponse is privileged) - not exempt.

No. 95 – October 2000 e-mail from Dianne Perry to numerous POP representatives, outside counsel Bartz, and POP counsel Streisinger and Ring with attached two-page document (except noted privileged material) – not exempt.

No. 98 – October 2000 e-mail (except noted privileged material) from Dianne Perry to numerous POP representatives and outside counsel Bartz with attached one-page draft document – <u>not</u> exempt.

III. CONFIDENTIAL SUBMISSIONS EXEMPTION.

ORS 192.502(4) exempts:

Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by its disclosure.

According to the February 4, 2002 affidavit of Dianne Perry, the Corps of Engineers "white paper" (Bob Hrdlicka Document No. 8) was submitted in confidence. It was a voluntary submission by the Corps and Ms. Perry agreed to keep the document confidential. The white

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paper was to be "shared only with other ports serving as non-federal sponsors for the Columbia River navigation channel deepening project."

"The purpose of this exemption is to encourage voluntary submissions of relevant information to public bodies, with some reasonable assurance that the information will be kept confidential." Attorney General's Public Records Manual, 2001, p. 64. POP Assistant General Counsel Kirk noted in his January 18 letter to this office that the white paper was "not subject to disclosure under the federal Freedom of Information Act." The Corps has recently reiterated the continued confidential nature of the white paper and advised Ms. Perry "the Port was not authorized to release it." The federal government is the proper custodian of the document and a request for its disclosure can and should be made under the Freedom of Information Act. See ORS 192.502(10).

The first four requirements of the exemption have been met. A thorough review of the document itself reveals factual information, commentary, opinions, and recommendations of an interim nature. We have evaluated the white paper in light of the petitioner's concerns and explanation of the public interest. There is, however, nothing embarrassing, controversial, or particularly significant in the document. Its disclosure, however, would affect the sensitive relationship between the Port of Portland and the Corps. Disclosure must be denied.

ORDER

Accordingly, it is ordered that the Port of Portland promptly disclose the records sought in the above petition as follows: No. 8 (except exempt confidential communication), No. 9 (except privileged material), No. 10 and 11 (except privileged lines), No. 13 (except privileged paragraph), No. 17 (except privileged paragraph), No. 59, No. 75 (except privileged sentences), No. 93 (except privileged e-mail), No. 95 (except privileged response and paragraph), No. 98 (except privileged sentence, e-mail and memorandum), and No. 222 (except three privileged e-mails). Disclosure of the documents ordered is subject to payment of the Port of Portland's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

MICHAEL D. SCHRUNK

District Attorney

Multnomah County

John C. Bradley

First Assistant

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NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.